

REMARKS/ARGUMENTS

Claims 1-3, 15-22, 24-26, 29, 39-58, 61, 62, 75, 76, 79, 80, 83, 84, and 87-116 are now pending in this application. Claims 1, 15, 39, 53 and 99 are independent claims. Claims 1, 2, 15-16, 18-21, 26, 29, 39-45, 47, 51, 52-58, 61, 62, 75, 76, 79, 80, 83, 84, and 87-116 were previously presented. Claims 48 and 49 are currently amended. Claims 4-14, 23, 27-28, 30-38, 59-60, 63-74, 77-78, 81-82, and 85-86 were cancelled without prejudice. There is no net gain of the number of claims, thus, no additional claims fees are necessary.

Claim Rejections – 35 USC § 103

Claims 1-2, 15, 18-19, 24-26, 29, 39-41, 45-47, 50, 53, 55-58, 61-62, 79-80, 83-84, 87-99, and 100-116 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Levinson, USPN: 4,923,704 (hereinafter: Levinson), in view of Wang and Tong, USPN: 6,463,844 (hereinafter: Wang). (Final Office Action, Page 2).

Claims 3, 42-44, and 54, stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Levinson, in view of Wang and further in view of Koochaki, USPN: 6,229,131 (hereinafter: Koochaki). (Final Office Action, Page 3).

Claims 16-17 and 51-52 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Levinson, in view of Wang and further in view of Barnes USPN: 6,608,292 (hereinafter: Barnes). (Final Office Action, Page 4).

Claims 48-49 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Levinson, in view of Wang and further in view of Craft, USPN: 6,018,157 (hereinafter: Craft). (Final Office Action, Page 4).

Claims 75-76, stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Levinson, in view of Wang and further in view of Thompson, USPN: 3,669,688 (hereinafter: Thompson). (Final Office Action, Page 5). Applicant respectfully traverses these rejections.

“To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the

references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations.” (emphasis added) (MPEP § 2143). “If an independent claim is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is non-obvious.” (emphasis added) *In re Fine*, 837 F. 2d 1071, 5USPQ2d 1596 (Fed. Cir. 1988).

Applicant respectfully submits that independent Claims 1, 15, 39, 53 and 99 include elements that have not been disclosed by any of the references cited by the Patent Office, either alone or in combination.

For example, independent Claims 1 and 15 of the present invention each generally recite, “a gelatinous ingredient that is not extracted from the food item being prepared . . .” Independent Claims 39, 53, and 99 of the present invention each generally recite, “a gelatinous ingredient for the food item, wherein the gelatinous ingredient is not extracted from the food item being prepared. . .” Neither Levinson or Wang disclose, teach, or suggest, individually or in combination, a gelatinous ingredient.

The Patent Office concedes that, “Levinson does not disclose a gelatinous ingredient for said food item positioned in the lower housing section, wherein said gelatinous ingredient is not extracted from the food item.” (Final Office Action, Page 3). The Patent Office asserts that “Wang discloses a gelatinous ingredient (21) for said food item positioned in the lower housing section (14), wherein said gelatinous ingredient is not extracted from the food item (col. 11, lines 32-37).” (Final Office Action, Page 3). However, Wang discloses, “a conventional flavoring agent dispersed or dissolved in water or cooking oil or provided in powder form,” which discloses a liquid with a dissolved flavoring or a powdered flavoring and does not make any referenced to a gelatin. (Wang, Col. 11, Lines 32-37).

Terms of a claim carry “their ordinary meaning, unless it appears that the

inventor used them differently.” *Gargoyles Inc. v. United States* 28 USPQ 2d 1715, 1716-17 (Fed. Cir. 1993). The Patent Office further asserts that “The cooking oil is in the form of gelatinous in which it is depending on its viscosity and temperature. For example, if user placed cooking oil in refrigerator it is transformed into gelatinous form.” (Final Office Action, Page 5). However, oil and/or water is in a liquid form at ambient or warmer temperatures unlike a gelatinous ingredient based on the ordinary meaning of a gelatinous ingredient. Oil is a sol and therefore by definition cannot be a gelatinous ingredient. Therefore, a gelatinous ingredient is not water or oil with a dissolved flavor agent or a powdered flavoring agent. Because Wang discloses only water and oil with a dissolved flavoring agent and/or a powdered flavoring agent, and does not disclose a gelatinous flavoring agent or ingredient as conceded by the Patent Office to be not included in Levinson, the water or oil with a dissolved flavor agent and/or a powdered flavoring agent cannot be equivalent to the gelatinous ingredient of the Instant Application.

Based on the rationale above, Applicant contends that none of the references cited by the Patent Office against the present invention, either alone or in combination, appear to disclose the above-referenced elements as claimed in Claims 1, 15, 39, 53 and 99 of the present application and therefore, the above-cited references do not preclude patentability of the present invention under 35 U.S.C. § 103(a). Applicant further contends that it would not have been obvious to one of ordinary skill in the art at the time of the present invention to combine or modify any of the above-cited references, either alone or in combination, to arrive at the present invention as claimed. As a result, a *prima facie* case of obviousness has not been established for independent Claims 1, 15, 39, 53 and 99. Thus, independent Claims 1, 15, 39, 53 and 99 are believed allowable. Further, Claims 2, 3, 89, and 93 (which depend from claim 1), Claims 16-22, 24-26, 29, 90, and 94 (which depend from claim 15), Claims 40-52, 61, 75, 79, 83, 87, 91, 95, 97, and 100-108 (which depend from claim 39), Claims 54-58, 62, 76, 80, 84, 88, 92, 96, and 98 (which depend from claim 53), and

Claims 109-116 (which depend from claim 99) are therefore allowable.

Furthermore, Applicant respectfully submits that depending Claims 105 and 114 include elements that are not disclosed by any of the references cited by the Patent Office, either alone or in combination.

For example, dependent Claims 105 and 114 generally recite, "steam that rises from said interior space of said bottom housing section and through said grill apertures comprises an aroma that is applied to the food items." The Patent Office asserts that, "Claims. . . 100-116 are rejected under 35 U.S.C. 103(a) as being unpatentable over Levinson (US 4,923,704) in view of Wang et al (US 6,463,844) both cited in previous references." (Final Office Action, Page 2, Paragraph 2). However, neither Wang or Levinson disclose an aroma applied to the food item by steaming. Therefore, neither Wang or Levinson teach or suggest the claimed limitations of an aroma that is applied to the food item by steaming of the Instant Application.

Based on the rationale above, Applicant contends that none of the references cited by the Patent Office against the present invention, either alone or in combination, appear to disclose the above-referenced elements as claimed in Claims 105 and 114 of the present application and therefore, the above-cited references do not preclude patentability of the present invention under 35 U.S.C. § 103(a). Applicant further contends that it would not have been obvious to one of ordinary skill in the art at the time of the present invention to combine or modify any of the above-cited references, either alone or in combination, to arrive at the present invention as claimed. As a result, a *prima facie* case of obviousness has not been established for Claims 105 and 114. Thus, Claims 105 and 114 are believed allowable.

Additionally, Applicant respectfully submits that dependent Claims 106, 107, 115, and 116 include elements that do not appear to have been disclosed by any of the references cited by the Patent Office, either alone or in combination.

For example, dependent Claims 106, 107, 115, and 116 generally recite,

“steam that rises from said interior space of said bottom housing section and through said grill apertures comprises a coloring that is applied to the food items.” The Patent Office asserts that, “Claims. . . 100-116 are rejected under 35 U.S.C. 103(a) as being unpatentable over Levinson (US 4,923,704) in view of Wang et al (US 6,463,844) both cited in previous references.” (Final Office Action, Page 2, Paragraph 2). However, neither Wang or Levinson disclose a coloring that is applied to the food items by steaming. Therefore, neither Wang or Levinson teach or suggest the claimed limitations of a coloring that is applied to the food items by steaming of the Instant Application.

Based on the rationale above, Applicant contends that none of the references cited by the Patent Office against the present invention, either alone or in combination, appear to disclose the above-referenced elements as claimed in Claims 106, 107, 115, and 116 of the present application and therefore, the above-cited references do not preclude patentability of the present invention under 35 U.S.C. § 103(a). Applicant further contends that it would not have been obvious to one of ordinary skill in the art at the time of the present invention to combine or modify any of the above-cited references, either alone or in combination, to arrive at the present invention as claimed. As a result, a *prima facie* case of obviousness has not been established for Claims 106, 107, 115, and 116. Thus, Claims 106, 107, 115, and 116 are believed allowable.

Applicant respectfully submits that dependent Claims 48 and 49 include elements that do not appear to have been disclosed by any of the references cited by the Patent Office, either alone or in combination.

For example, dependent claim 48 generally recite, “said inert gas reduces at least one of decay, oxidation, and spoilage of the food product and the gelatinous ingredient.” Moreover, Claim 49 generally recites a, “housing being sealed and evacuated of air.” Neither Levinson, Wang, or Craft disclose, teach, or suggest individually or in combination an inert gas or evacuated air for reducing decay, oxidation, and spoilage of the food product and the gelatinous ingredient.

The Patent Office concedes that Levinson and Wang do not disclose an inert gas being added into said microwavable housing. (Final Office Action, Page 4). The Patent Office asserts that "Craft discloses an inert gas being added into said microwavable housing (col. 4, lines 10-18)." (Final Office Action, Page 4). The Patent Office further asserts, "However, Craft discloses, "glass tubes 50 of the upper heating unit 24. . . Each of the glass tubes 50 provides a tubular enclosure for retaining an inert gas 54 in an interior cavity." (Craft, Col. 3, Lines 62-67 and Col. 4, Line 1). The inert gas in Craft is located in the glass tubes of the claimed heating apparatus and is not located in a package or microwavable housing. (Craft, Col. 3, Lines 62-67 and Col. 4, Lines 1-18). The Patent Office further asserts, "It would be obvious to one having skill in the art at the time the invention was made to utilize in Levinson/Wang an inert gas being added into said microwaveable housing as taught by Craft in order to repeated cooking cycles without requiring replacements and without significant degradation of the microwave grill." (Final Office Action, Pages 6 and 7). However, the inert gas utilized in the Instant Application prevents oxidation and/or spoilage and/or reduces decay of the food product and the gelatinous ingredient. The inert gas is not utilized to prevent significant degradation of the microwave grill. Furthermore, Neither Levinson, Wang, or Craft disclose a microwaveable housing being sealed and evacuated of air. In fact, Craft requires the insertion of an inert gas into a microwavable housing the opposite of evacuating air. (Craft, Col. 4, Lines 10-18).

Further, "in order to render a claimed apparatus or method obvious, the prior art must enable one skilled in the art to make and use the apparatus or method." *Rockwell Int'l Corp. v. United States*, 147 F. 3d 1358, 47 USPQ 2d 1027, 1032 (Fed. Cir. 1998) (citing *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F. 3d 1461, 1471, 43 USPQ 2d 1481, 1489 (Fed. Cir. 1997). Therefore, "a reference published before a patent's critical date is prior art only for that which the reference enables." *F.B. Leopold Co. v. Roberts Filter Mfg. Co.*, Civ. App. 96-1218 (Fed. Cir. July 2, 1997) (unpublished) (citing *Beckman Instruments, Inc. v.*

LKB Produkter AB, 892 F.2d 1547, 1551, 13 USPQ 2d 1301, 1304 (Fed. Cir. 1989). Craft enables only the method of filling a glass tube with an inert gas and does not enable how to utilize an inert gas in a sealed microwavable housing to reduce spoilage and/or prevent oxidation and/or spoilage of the food product and gelatinous ingredient. Further, Craft does not enable the evacuation of air to reduce spoilage and/or prevent oxidation and/or spoilage of the food product and gelatinous ingredient.

Based on the rationale above, Applicant contends that none of the references cited by the Patent Office against the present invention, either alone or in combination, appear to disclose the above-referenced elements as claimed in Claims 48 and 49 of the present application and therefore, the above-cited references do not preclude patentability of the present invention under 35 U.S.C. § 103(a). Applicant further contends that it would not have been obvious to one of ordinary skill in the art at the time of the present invention to combine or modify any of the above-cited references, either alone or in combination, to arrive at the present invention as claimed. As a result, a *prima facie* case of obviousness has not been established for Claims 48 and 49. Thus, Claims 48 and 49 are believed allowable.

As the Examiner is well aware, Applicant is required to seasonably challenge statements by the Examiner that are not supported on the record, and failure to do so will be construed as an admission by Applicant that the statement is true. M.P.E.P. §2144.03.

The Patent Office asserts that, "One ordinary skill in the art should know metal devices now can be use inside microwave chamber for cooking, and the metal microwave steam cooking kit disclosed in Levinson made of aluminum material, which uses for cooking inside microwave chamber and metal backing pan disclosed in Wang also made of aluminum material (col. 11, lines 20-25); therefore, it should be good to use inside microwave oven, since both of devices use with same metal material, aluminum." (Final Office Action, Page 8).

However, as known by a person of skill in the art aluminum is not typically safe for microwave heating. Typically, aluminum may only be utilized if has been specifically configured, specifically treated, and/or utilized in a limited amount. For example an aluminum pan or pop can is not safe for heating in a microwave. The baking pan as claimed in Levinson cannot be utilized in a microwave oven without going beyond the scope of the application.

Therefore, in accordance with Applicant's duty to seasonably challenge such unsupported statements, the Examiner is hereby requested to cite a reference supporting the position that it would have been obvious to utilize an aluminum baking pan not disclosed as being viable in a microwave disclosed in Wang (Wang, Col. 11, Lines 20-25) with the aluminum microwave steam cooking kit disclosed in Levinson (Levinson, Title and Abstract) to form a microwavable apparatus that is disposable to grill food products in a microwave in accordance with the claimed invention (Present Application, Page 1, Lines 5-7 and Page 7, lines 19-24). If the Examiner is unable to provide such a reference, and is relying on facts based on personal knowledge, Applicant hereby requests that such facts be set forth in an affidavit from the Examiner under 37 C.F.R. 1.104(d)(2). Absent substantiation by the Examiner, it is respectfully requested that the rejection under 35 U.S.C. § 103 be withdrawn.

Additionally, as the Examiner is aware, the examiner "ordinarily should reject each claim on all valid grounds available." M.P.E.P. §707.07(g) Further, "[w]here a major technical rejection is proper, it should be stated with a full development of reasons rather than by a mere conclusion coupled with some stereotyped expression." *Id.* The examiner's action should be complete as to all matters. 37 C.F.R. 1.104 and M.P.E.P. §707.07(a).


No technical rejection or development of a rejection has been made for Claims 20, 21, and 22. As a result, a *prima facie* case for any type of rejection has not been established for Claims 20, 21, and 22. Thus, Claims 20, 21, and 22 are believed allowable.

Moreover, all arguments made in previous responses to Final Office Actions traversing a 35 U.S.C. § 103(a) rejection by relying on Wang, Levinson, Koochaki, Barnes, Craft, and/or Thompson are reasserted herein.

CONCLUSION

In light of the forgoing, reconsideration and allowance of the pending claims is earnestly solicited.

Respectfully submitted on behalf of
ConAgra Foods, Inc.,

By: 
Marianne R. Timm
Reg. No. 58,085

Dated: July 17, 2007

Marianne R. Timm
Suiter • Swantz PC LLO
14301 FNB Parkway, Suite 220
Omaha, NE 68154
(402) 496-0300 telephone
(402) 496-0333 facsimile